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11 **UNITED STATES DISTRICT COURT**

12 **NORTHERN DISTRICT OF CALIFORNIA**

13 DARREN JOHNSON, et al.,

14 *Plaintiffs,*

15 vs.

16 GILEAD SCIENCES, INC.,

17 *Defendant.*

18 Case No. 4:23-cv-01439-JST

19 **JOINT STIPULATION AND [PROPOSED]  
20 ORDER REGARDING DISMISSAL OF  
21 CLAIMS AND RESPONSIVE PLEADINGS**

## **JOINT STIPULATION**

Pursuant to Northern District of California Civil Local Rule 7-12, Plaintiffs in *Johnson et al. v. Gilead Sciences, Inc.*, No. 4:23-cv-01439-JST (“*Johnson*”) and Defendant Gilead Sciences, Inc. (“*Gilead*”) (collectively, the “*Parties*”), by and through their respective undersigned counsel of record, submit the following Stipulation and Proposed Order:

WHEREAS, on February 27, 2019, Gilead filed its motion to dismiss in the actions entitled *Holley et al. v. Gilead Sciences, Inc.*, No. 4:18-cv-06972-JST (“*Holley*”), and *Dowdy et al. v. Gilead Sciences, Inc.*, No. 4:19-cv-00481-JST (“*Dowdy*”) (ECF No. 45);

WHEREAS, on May 10, 2019, the Court granted in part and denied in part Gilead’s motion to dismiss in *Holley* and *Dowdy* (ECF No. 75) (“May 10 Order”);

WHEREAS, the Court's May 10 Order stated that: "Plaintiffs' opposition makes clear that they are not pursuing claims that Gilead should have pursued a different drug composition after approval." (ECF No. 75 at 13 n.6);

WHEREAS, on May 10, 2019, 127 additional plaintiffs filed suit against Gilead in the action entitled *Lyons et al. v. Gilead Sciences, Inc.*, No. 4:19-cv-02538-JST (“*Lyons*”);

WHEREAS, on May 31, 2019, plaintiffs filed a First Amended Consolidated Complaint for Damages (ECF No. 84) (“FAC”), including the claims of all plaintiffs from the *Holley*, *Dowdy*, and *Lyons* actions, under *Holley* as the lead case;

WHEREAS, on July 10, 2019, Gilead filed a motion to dismiss plaintiffs' FAC for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) (ECF No. 91), and a motion to dismiss plaintiffs' FAC under Federal Rules of Civil Procedure 8(a), 9(b), and 12(b)(6) (ECF No. 92);

WHEREAS, on October 16, 2019, the Court granted in part and denied in part Gilead's motions to dismiss plaintiffs' FAC (ECF No. 123) ("October 16 Order");

WHEREAS, the Court's October 16 Order: (1) severed and dismissed the claims of 16 California plaintiffs in order to perfect diversity jurisdiction; (2) dismissed "without leave to amend, but without prejudice to any future motion to amend on a showing of good cause," plaintiffs' fraud and consumer protection claims "to the extent they rely on allegations of affirmative

1 misrepresentations rather than omissions"; and (3) dismissed without leave to amend, but without  
 2 prejudice to any future motion to amend on a showing of good cause, "[p]laintiffs' post-approval,  
 3 post-July 2012 failure-to-warn claims." (ECF No. 123 at 12);

4 WHEREAS, Gilead answered the *Holley* FAC on December 13, 2019 (ECF No. 142);

5 WHEREAS, on March 27, 2023, *Johnson* Plaintiffs filed suit against Gilead in this District;

6 WHEREAS, on August 10, 2023, the Court consolidated the *Johnson* action with the *Holley*  
 7 action for pretrial purposes (ECF No. 1357);

8 WHEREAS, the Parties agree that, for purposes of appeal, or for any other purposes, the  
 9 briefs and supporting papers, together with the oral argument, regarding Gilead's above-described  
 10 motions to dismiss and the Court's orders on those motions shall be treated as having been filed and  
 11 entered in the *Johnson* action;

12 WHEREAS, *Johnson* Plaintiffs agree that they are not asserting claims that Gilead should  
 13 have changed the design of its FDA-approved TDF medications after the FDA approved the TDF  
 14 medications;

15 WHEREAS, by stipulating to the foregoing, *Johnson* Plaintiffs do not intend to limit, in any  
 16 way, their claims that Gilead should have changed the design of its TDF medications before FDA  
 17 approval;

18 WHEREAS, *Johnson* Plaintiffs agree, without prejudice to any future motion to amend on a  
 19 showing of good cause, to the dismissal of their (1) fraud and consumer protection claims to the  
 20 extent they rely on allegations of affirmative misrepresentations and (2) post-approval, post-July  
 21 2012 failure-to-warn claims (ECF No. 123 at 12) if any;

22 WHEREAS, by stipulating to the foregoing, the Parties do not intend to waive any right to  
 23 discovery or to appeal from the decisions of the Court discussed herein;

24 WHEREAS, the Parties wish to avoid further unnecessary motion practice on the pleadings  
 25 at this time, and to avoid the burdens of requiring similar answers to successive complaints; and

26 WHEREAS, the Parties request that the Court issue an Order staying Gilead's deadline to  
 27 respond to the *Johnson* Complaint, and requiring agreement of the Parties or leave of Court for the  
 28 filing of a motion to dismiss the *Johnson* Complaint.

1 THEREFORE, IT IS HEREBY STIPULATED, by and between the Parties, through their  
2 respective undersigned counsel of record, and pursuant to Civil Local Rule 7-12, that:

- 3 1. The briefs and supporting papers, together with the oral argument, regarding Gilead's  
4 motions to dismiss in the *Holley*, *Dowdy*, and *Lyons* actions and the Court's orders on  
5 those motions shall be treated as having been filed and entered in the *Johnson* action.
- 6 2. *Johnson* Plaintiffs are not asserting claims that Gilead should have changed the  
7 design of its FDA-approved TDF medications after the FDA approved the TDF  
8 medications.
- 9 3. Any fraud and consumer protection claims that rely on allegations of affirmative  
10 misrepresentations, rather than omissions, are dismissed from the *Johnson* action  
11 without leave to amend, but without prejudice to any future motion to amend on a  
12 showing of good cause.
- 13 4. Any post-approval, post-July 2012 failure-to-warn claims are dismissed from the  
14 *Johnson* action without leave to amend, but without prejudice to any future motion to  
15 amend on a showing of good cause.
- 16 5. Gilead's deadline to respond to the *Johnson* Complaint is hereby stayed pending  
17 further order of the Court.
- 18 6. Except if *Johnson* Plaintiffs files an amended complaint, Gilead shall not file a  
19 motion to dismiss any claim or complaint in the *Johnson* action without first  
20 obtaining either the agreement thereto of *Johnson* Plaintiffs or leave of court.
- 21 7. Nothing herein is intended to or constitutes a waiver of any Party's discovery or  
22 appellate rights.

23 **STIPULATED AND AGREED TO BY:**

24 Dated: August 29, 2023

RUTHERFORD LAW PC

25 By: /s/ Jack Griffith Rutherford  
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4 *Attorney for Johnson Plaintiffs*

5 Dated: August 29, 2023

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20 *Attorneys for Defendant Gilead Sciences, Inc.*

1                   **CERTIFICATE OF SERVICE**

2                   I hereby certify that on this 29th day of August, 2023 I electronically filed the foregoing with  
3 the Court using the CM/ECF system, and thereby delivered the foregoing by electronic means to all  
4 counsel of record.

5                   */s/ Joshua E. Anderson*  
Joshua E. Anderson

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1                   **ATTESTATION PURSUANT TO CIVIL L.R. 5-1(i)(3)**

2                   I am the ECF User whose identification and password are being used to file the foregoing  
3 Stipulation and [Proposed] Order Regarding Dismissal of Claims and Responsive Pleadings.  
4 Pursuant to Civil Local Rule 5-1(i)(3), I hereby attest that the other signatories have concurred in  
5 this filing.

6                   */s/ Joshua E. Anderson* \_\_\_\_\_

7                   Joshua E. Anderson

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1                   **[PROPOSED] ORDER**

2                   Pursuant to the foregoing stipulation of the parties and good cause appearing, it is hereby  
3 ORDERED as follows:

- 4                   1. The above stipulation is GRANTED.
- 5                   2. The briefs and supporting papers, together with the oral argument, regarding Gilead's  
6                   motions to dismiss in the *Holley*, *Dowdy*, and *Lyons* actions and the Court's orders on  
7                   those motions shall be treated as having been filed and entered in the *Johnson* action.
- 8                   3. *Johnson* Plaintiffs are not asserting claims that Gilead should have changed the  
9                   design of its FDA-approved TDF medications after the FDA approved the TDF  
10                  medications.
- 11                  4. Any fraud and consumer protection claims that rely on allegations of affirmative  
12                  misrepresentations, rather than omissions, are dismissed from the *Johnson* action  
13                  without leave to amend, but without prejudice to any future motion to amend on a  
14                  showing of good cause.
- 15                  5. Any post-approval, post-July 2012 failure-to-warn claims are dismissed from the  
16                  *Johnson* action without leave to amend, but without prejudice to any future motion to  
17                  amend on a showing of good cause.
- 18                  6. Gilead's deadline to respond to the *Johnson* Complaint is hereby stayed pending  
19                  further order of the Court.
- 20                  7. Except if *Johnson* Plaintiffs file an amended complaint, Gilead shall not file a motion  
21                  to dismiss any claim or complaint in the *Johnson* action without first obtaining either  
22                  the agreement thereto of *Johnson* Plaintiffs or leave of court.
- 23                  8. Nothing herein is intended to or constitutes a waiver of any Party's discovery or  
24                  appellate rights.

25                   **PURSUANT TO STIPULATION, IT IS SO ORDERED.**

26                   Dated: \_\_\_\_\_, 2023

27                   \_\_\_\_\_  
28                   Honorable Jon S. Tigar  
                    United States District Judge